

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2014-332

GARY SEWELL

APPELLANT

VS. FINAL ORDER  
SUSTAINING HEARING OFFICER'S  
FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER

JUSTICE AND PUBLIC SAFETY CABINET  
DEPARTMENT OF JUVENILE JUSTICE

APPELLEE

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The Board at its regular January 2016 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 2, 2015, having considered Appellee's exceptions and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

**SO ORDERED** this 13<sup>th</sup> day of January, 2016.

KENTUCKY PERSONNEL BOARD

  
MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Stafford Easterling  
Gary Sewell  
Grace Smith

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2014-332**

**GARY SEWELL**

**APPELLANT**

**VS.**

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER**

**JUSTICE AND PUBLIC SAFETY CABINET  
DEPARTMENT OF JUVENILE JUSTICE  
J. MICHAEL BROWN, APPOINTING AUTHORITY**

**APPELLEE**

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This matter came on for evidentiary hearing on October 13, 14 and 22, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Gary Sewell, was present and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Juvenile Justice (DJJ), was also present and represented by the Hon. Stafford Easterling. Appearing as Agency representative was Bob Hayter, Commissioner of DJJ.

This matter involved the termination of the Appellant as a non-merit Division Director by letter dated December 22, 2014. The Appellant has alleged that he was dismissed based on age or disability discrimination or in violation of his rights under the Family Medical Leave Act. As such, the burden of proof was placed upon the Appellant by a preponderance of the evidence to prove the claims.

**BACKGROUND**

1. The Appellant called as his first witness, **J. Michael Brown**. He has been the Secretary of the Justice and Public Safety Cabinet for in excess of seven years. DJJ is a unit contained within the Justice and Public Safety Cabinet.

2. The witness confirmed that he had signed the December 22, 2014 letter of termination, terminating the non-merit Appellant from his Division Director position without cause. He then added he was not aware of someone in the Cabinet having made a previous statement in the executive staff meeting that, "You old folks had better get on board."

3. Regarding the Family Medical Leave Act (FMLA), he advised he was under the impression that the Appellant had returned to work from being on FMLA at the time of his termination. He later on learned the Appellant was actually still on FMLA.

4. The witness then identified Appellant's Exhibit 2, a March 5, 2012 letter of commendation issued to the Appellant for his heroic efforts at Woodsbend Youth Development Center following a March 2 tornado. Secretary Brown then testified that in May 2014, at the re-dedication of Woodsbend Youth Development Center, he observed the Appellant present. He does not recall having any input with the Appellant there regarding any appeals.

5. Lastly, the witness testified that in 2014, within DJJ, Appellant was the only non-merit dismissal. He identified another non-merit employee, Diana McGuire, as having been given the choice to either resign or retire; likewise, he mentioned that Sherre Smith-Jones, the Deputy Commissioner of DJJ, was given a chance to take another position.

6. The Appellant's second witness was **Bob Hayter**. He has been Commissioner of DJJ for approximately 18 months. He testified that he hand-delivered the dismissal letter to the Appellant. When delivering this letter, the witness testified that he received a December 22, 2014 letter of resignation/retirement from the Appellant, stating the retirement would be effective January 16, 2015. (Appellant's Exhibit 3.) Hayter further testified that when he handed the termination letter to the Appellant, he had not yet seen the resignation letter and he denied telling the Appellant that resignation was not an option. He also did not recall making any specific commendatory comments about the Appellant during that meeting.

7. The witness also identified a June 27, 2014 memo from himself to Appellant, lavishing strong praise and best wishes for the future. (Appellant's Exhibit 4.)

8. Questioned as to reversion rights to which the Appellant might be entitled, the witness testified that he did not think there were any vacant similar positions available within the Department at the time of termination. He also added that he did not recommend Appellant's dismissal to higher-ups in the Department and freely admitted he did not feel good about the situation. He also denied any involvement in any Human Resources complaint filed by the Appellant.

9. On cross-examination, the witness explained that he had no discussions with anyone in upper management relative to the issues of age, disability, or the Appellant's FMLA status.

10. On re-direct, the witness confirmed that he had no idea of what the reason was for the Appellant's termination.

**Second Day:**

11. Appellant recalled **Commissioner Hayter** at the beginning of the second day. The witness testified that as of approximately March 2014, he had begun to hear rumors that the Appellant was going to be terminated, but stated there was nothing concrete to his knowledge.

12. The Appellant's next witness was **Mark Cook**. He has been the Deputy Commissioner for DJJ for the past nine months. His workstation is at Green River Youth Development Center (GRYDC). Regarding the question surrounding his failure to appear the first day after having been served a subpoena, the witness clarified that the subpoena was actually delivered to central office in Frankfort and he did not receive the subpoena until the morning of the first day, thereby leaving him unable to make the necessary arrangements to appear.

13. The witness testified that he was the Appellant's supervisor at the time of dismissal. He likewise had no conversations with the Commissioner or the Secretary regarding Sewell's dismissal. He further added the Appellant was an excellent employee. He also added that while he served as the Director of the Central Region, he would often ask the Appellant for advice.

14. The witness explained that he felt the Southeastern Region, of which Appellant was the Division Director, was very favorable with the other regions in the state. He also denied hearing former DJJ Commissioner Hasan Davis saying in a staff meeting that, "You old people better get on board."

15. On cross-examination, the witness denied any knowledge of age, disability, or FMLA status as being a factor in the Appellant's termination.

16. Appellant's next witness was **Lisa Tucker**. She has been employed with DJJ as a Southeastern Regional Division Director for the past six months. Previously, she was the Southeastern Regional Administrator. She has succeeded the Appellant in his previous job. She testified that she had worked with and under the Appellant in the Southeastern Region.

17. At some point, she testified that she began to believe that the Appellant was targeted for dismissal. She attributes this to the fact that Aramark sought to be the food and service provider for the Department. She stated this caused some unknown conflict, but that it occurred in approximately 2008-2009.

18. The witness then introduced Appellant's Exhibit 6, a January 16, 2015 e-mail in which the Appellant, among various others, was invited to the Cadet Leadership and Education Program (CLEP) graduation. Apparently this program was one which the Appellant was very instrumental in initiating. The witness then acknowledged that over a month later, an e-mail was sent to all superintendents in the Southeastern Region advising them not to let non-DJJ employees visit the facilities. However, the witness denied that this e-mail was in direct response to his attendance at the graduation.

19. The witness also added that the Appellant's former Administrative Assistant, Jessica Hamilton, drove him to the previously mentioned Woodsbend re-dedication because the Appellant was undergoing cancer treatments. She noted that Hamilton was later involuntarily transferred to another position.

20. Also, this witness denied any knowledge of age, disability, or FMLA status as being a factor in termination.

21. Appellant's next witness was **Diana McGuire**. Before her retirement from DJJ, she was a non-merit Deputy Commissioner of Operations. She testified that it was not her choice to retire, but rather she was asked to in May 2014. No reason was given.

22. She also added she was told by Commissioner Hayter that she "had done nothing wrong." She gave her age as 58 at the time of her retirement.

23. She explained that in the spring of 2014, she had a conversation with former Commissioner Hasan Davis to the effect that Secretary Brown "was tired" of the Gary Sewell rumors involving him and Lisa Tucker. She also added in the spring of 2014, she had the feeling that upper management was upset with the Appellant because he was on FMLA. She stated that Commissioner Hayter told her to tell the Appellant to stay on FMLA, or he would be terminated if he returned.

24. The witness then introduced Appellant's Exhibit 7, an April 2, 2014 memo from the Appellant to her stating his need to take personal sick leave as a part of the cancer treatments.

25. On cross-examination, the witness testified that former Commissioner Davis was not involved in any way with the Appellant's termination, nor was she. She also added that she had no knowledge of any age, disability, or FMLA filing being a factor in his dismissal.

26. On redirect, the witness did recall being present in an upper-management executive staff meeting early in 2014 when Commissioner Davis had said, "You old people had better get on board." She recalled that this meeting was attended by approximately 12 to 15 people, with the majority in attendance being over the age of 40.

27. She added that she felt that she and the Appellant were among those the Commissioner was talking about.

28. The next witness was **Sharon Cook**. She has been the Human Resources Administrator in DJJ for approximately ten years. She explained that she was not aware that the Appellant's dismissal occurred while he was on FMLA. Rather, she thought that his employment rights were protected. She was in no way involved in Appellant's termination and has no knowledge of age, disability, or FMLA filing as being factors in his termination. She also explained that it was not her job responsibility to interpret the FMLA.

29. Appellant's next witness was **Ron Long**. He has been the Superintendent at the Adair Youth Development Center (AYDC) for approximately one year. He testified that he has worked with the Appellant in the past. He has no knowledge of anyone being targeted for dismissal and knows nothing about the Appellant's termination.

30. The Appellant's next witness was **Chris Banks**. He has been the Director of CLEP within the Agency for the past sixteen years. He confirmed that the Appellant was the one who instituted this program initially. He had some vague feeling that some people were targeted to be terminated; however, he has no knowledge surrounding the Appellant's termination. Likewise, he has no knowledge that age, disability, or FMLA filing were factors in the termination.

31. Appellant's next witness was **Kelly Hibbits**. He has been the Superintendent at the London Group Home for approximately the past three months. He was also involved with CLEP.

32. He testified that he felt the Southeastern Region under the Appellant's guidance was one of the best regions in DJJ. He added that while he worked in the Southeastern Region, he had the feeling there was some targeting of employees occurring; however, he has no knowledge of Appellant's termination.

33. Appellant's next witness was **Gary Drake**. He has been the Superintendent at the Breathitt Youth Development Center (BYDC) for the past seven years. He recalled that at the CLEP graduation in January 2015, the Appellant was in attendance. He (Drake) was not upset that the Appellant was there. He also stated that that he did not know if the e-mail sent after the CLEP graduation asking that non-DJJ members be barred from entering facilities was a result of the Appellant's attendance. He added that the Appellant was a good employee.

34. This witness opined that he felt Secretary Brown was mad at the Appellant for some reason over the Aramark situation some years before. However, he also heard the Secretary call him a "hero" for his actions at Woodsbend after the tornado.

35. He added that the staff was in a "state of confusion" after Appellant's dismissal. He also stated that he has no knowledge of why the Appellant was terminated.

36. The Appellant, **Gary Sewell**, then called himself to testify. He stated that he had been a state employee for twenty-eight years at the time of his dismissal and was age 62 at that time. He had been employed as a non-merit Division Director over the Southeastern Region for approximately the previous six years.

37. In April 2014, he was forced to take personal sick leave for about five months while undergoing cancer treatments. Sometime after the five month period, he returned to work for a short while until November 2014. After returning to work, he was on intermittent FMLA, where he worked approximately three days per week until December 22, when he was terminated.

38. The witness then identified Appellant's Exhibit 3, the notice of Resignation/Retirement which he gave to Commissioner Hayter on the date of receiving his termination letter.

39. On cross-examination, the witness stated that he felt three of approximately four non-merit operational people were either dismissed or forced to leave. He has no direct evidence of discrimination on the part of either Secretary Brown or Commissioner Hayter. Appellant announced closed. Upon closure of the Appellant's case, the Appellee moved for a directed verdict, arguing the Appellant had not made a *prima facie* case as to his claims of disability, age, or FMLA. The Hearing Officer **GRANTED** the motion as to disability, but **DENIED** the motion as to age and FMLA.

40. The Appellee called as its first witness **Tina Moss**. She has been the Executive Staff Assistant and HR Director within DJJ for the past twenty-six years. She explained there are both federal and state FMLA statutes and regulations governing leave. She explained that an employee is entitled up to twelve weeks of leave per calendar year, or could be placed on special leave.

41. The witness also explained that the state can discipline or terminate an employee while he is on FMLA, but cannot terminate because of being on FMLA.

### **Third Day:**

42. The Appellee recalled **Secretary J. Michael Brown**. He denied that age, disability or FMLA were factors in his decision to terminate the Appellant. He terminated the Appellant "because he could." He added that he acted within his discretion in dealing with a non-merit position. The witness then went on to detail the actual reasons for dismissal, even though the termination letter had not stated any cause. Mr. Brown explained that in the 2014 Legislative Session, Senate Bill 200, a DJJ reform bill, was very important to him and to the administration. This bill dealt with status offenders and the purpose of the bill was to try to reduce the high incidence of detention of status offenders.

43. Senate Bill 200 had resulted from the work of a two-year task force and had been heavily debated. The Secretary learned during the latter part of the 2014 session from Senator Whitney Westerfield, the Senate Judiciary Chair, that he had concerns about comments made by the Appellant about the Bill. The Senator told the Secretary that he was informed that Appellant had taken a position against the Bill. The witness then felt that the Appellant's comments were in opposition to the administration, DJJ, and the Governor. Westerfield further related to this witness that the Appellant had remarked to him, "Commissioner Davis does not speak for DJJ."

44. On cross-examination, the witness testified that he was never made aware of Appellant's offer to retire/resign. He did recall that in February 2014, Senate Bill 200 was being discussed in a high level DJJ meeting where he had dropped in. He acknowledged that the Appellant was there, but does not recall any specific concerns expressed at that time by Appellant.

45. The witness closed by stating that he had not terminated the Appellant while on his recovery period from cancer, as he did not want to inflict anymore stress upon him.

46. The Appellee announced closed.

#### **FINDINGS OF FACT**

1. The Appellant, Gary Sewell, was terminated from his position as a non-merit Director by letter dated December 22, 2014, signed by Secretary J. Michael Brown.

2. Classified employees with status may only be terminated for cause. Non-merit employees may be terminated for any reason or no reason, as long as it is not an illegal reason [KRS 18A.095].

3. Despite the evidence showing the Appellant was competent in performing his duties, Secretary Brown exercised his discretion in terminating the Appellant. Brown clearly articulated his reason for termination, namely that Appellant did not support, and in fact, probably undermined a bill in the 2014 Legislature which was extremely important to the Cabinet and to the administration.

4. There is no credible evidence the Appellant was terminated because of his age (62) or the fact he was on intermittent FMLA.



**CONCLUSIONS OF LAW**

1. *McDonnell Douglas v. Green*, 411 US 792 (1973) is the seminal case in establishing the burden of proof and the shifting of burdens in cases where discrimination is alleged. First, the Appellant must show he was qualified for the positions sought; next the employer must establish a legitimate, non-discriminatory reason for the rejection; and then the employee must establish the reason for rejection was a pretext on the part of the employer.

2. The Hearing Officer concludes as a matter of law the first two steps of the analysis were met; however, the Hearing Officer concludes the Appellant failed to establish by a preponderance of the evidence that the employer's given reason was a pretext.

**RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **GARY SEWELL VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE (APPEAL NO. 2014-332)** be **DISMISSED**

**NOTICE OF EXCEPTION AND APPEAL RIGHTS**

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

**ISSUED** at the direction of **Hearing Officer R. Hanson Williams** this 2nd day of December, 2015.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Stafford Easterling  
Gary Sewell